(2)

No. 00-1212

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

STATE OF ALABAMA, Petitioner

v.

LOUIS GRIFFIN, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

---

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OPINION BELOW

Mr. Griffin was convicted on December 18, 1997, and he was sentenced to death on January 29, 1998. The Court of Criminal Appeals affirmed the conviction on December 10, 1999. Griffin v. State, CR-97-1026 (Ala. Crim. App. Dec. 10, 1999). The Alabama Supreme Court reversed the Court of Criminal Appeals and ordered a new trial on August 18, 2000. Ex parte Griffin, No. 1991354 (Ala. Aug. 18, 2000). The State's Application for rehearing was denied on October 27, 2000. Ex parte Griffin, No. 1991354 (Ala. Aug. 18, 2000). On December 22, 2000, the Court of Criminal Appeals remanded the case for a new trial. Griffin v. State, CR-97-1026 (Ala. Crim. App. Dec. 22, 2000).

CONSTITUTIONAL PROVISIONS INVOKED

United States Constitution, Amendment Five:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Eight:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Fourteen, provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts of the Case

The Alabama Supreme Court succinctly summarized the relevant facts of the case:

> Christopher Davis was killed on September 24, 1992. Two men were arrested in regard to the killing, Anthony Embry and Falanda Miles. Both were indicted for murder, based on eyewitness testimony and other evidence. Embry pleaded guilty to the charge of murder and was sentenced to 20 years imprisonment.[] Miles was tried and was acquitted by a jury.

> The Davis murder case was closed until April 1996, when Griffin pleaded guilty to violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), in the United States District Court for the Southern District of New York. Griffin was the "security man" for the 142nd Street Lynch Mob Crew ("the Crew) in New York City. The Crew supplies illegal drugs to sellers in various parts of the country, including Alabama. Griffin's RICO charge arose out of his involvement in this operation. In his pleas, Griffin entered an allocution in which he stated that he had participated in the death of Davis in September 1992. As a result of this testimony, authorities in Alabama exonerated Embry for the Murder of Davis and initiated proceedings against Griffin.
>
> At trial, Griffin claimed that he had lied to the federal court in order to receive favorable treatment, but that in reality he had not killed Davis. In order to support this contention, he attempted to present evidence indicating that the State had initially believed someone else committed the crime. Specifically, he sought to introduce evidence indicating: (1) that after the initial police investigation into Davis's death, the state charged Miles and Embry with the offense; (2) that Embry admitted to the murder while under oath in an Alabama court, by pleading guilty; (3) that Embry was convicted of the offense pursuant to a pleas agreement, and served four years in Alabama prisons for Davis's death before the State decided to prosecute Griffin; and (4) that a state court ex mero motu dismissed the valid plea of Embry. After an in limine hearing, the trial court excluded this evidence as inadmissible.

Ex parte Griffin, No. 1991354, slip op. at 2-4 (Aug. 18, 2000) (contained in the State's Petition, at p. 172a-175a) (footnotes omitted).

In addition to these facts, as recited by the Alabama Supreme Court, the actual circumstances surrounding the trial court's erroneous ruling — reversed by the Alabama Supreme Court — merit detail here. Mr. Griffin repeatedly sought to introduce evidence of the prosecution of Miles and Embry, and Mr. Embry's plea. In response, the prosecutor made a motion in limine to block the evidence of the plea of Embry and the prosecution of Miles:

> [COURT:] Anything else?
>
> MR. COCHRAN: Judge, just on the State's motion in limine to exclude reference to the fact that someone else pled guilty, for the record, I wanted to make sure the committee comments to — the advisory committee to the Alabama Rules of Evidence comments to Rule 804(b) (3), which is the statement against interest, which would be the only conceivable hearsay exception for somebody

else's confession to this crime — in that second paragraph of those committee notes, they note that Rule 804(b) (3) is not intended to negate prior Alabama case law excluding exculpatory statements of third persons offered by the accused in a criminal case.

They cite a case, *Flowers v. State*, 586 So. 2d 978, and *Garrison v. State*, 416 So. 2d 793. It's hearsay. And there's no exception that applies.

THE COURT: Do you want to be heard on that, Ms. Laumer?

MS. LAUMER: Your Honor, that's our contention as to why these witnesses that have been subpoenaed that are unavailable are so critical.

THE COURT: Well, one of the witnesses is available, the lady that we got last week. Your motion is granted, Mr. Cochran.

MR. GOMANY: Judge, we want to put in the fact that someone else was indicted, pled guilty, and was tried by this district attorney's office and identified as killing Christopher Davis four or five years ago.

THE COURT: You may not do that, subject to — you can make a note and you appeal on that basis if there's a conviction. I'm familiar with this law that Mr. Cochran cited, as you are too.

(R. 305-306) (emphasis supplied). The trial court adhered to its improper ruling, and prevented Mr. Griffin's counsel from even mentioning that Mr. Embry plead guilty to the very offense for which the state was prosecuting Mr. Griffin:

Mr. Cochran, who is the State's prosecutor in this case, has a duty to tell you everything that happened in this whole scenario. We expect the evidence to show that Anthony Embry and —

MR. COCHRAN: Judge, I'm going to have to object to this and ask if we can approach.

THE COURT: Sustained. You recall our conversation yesterday.

MR. GOMANY: Well, Judge, I need part of it but not all of it.

THE COURT: What do you want to talk about?

(Bench conference off the record.)

THE COURT: Please proceed.

MR. GOMANY: Yes, sir.

THE COURT: Thank you.

MR. GOMANY: Ladies and gentleman, just a few more points. Like I said, we have no burden. [Whereupon defense counsel concluded its opening statement without mention of Mr. Embry or Mr. Miles.]

(R. 332) Later, Mr. Griffin sought to have the trial court reconsider its ruling, but the court refused, holding that "I [the court] respectfully decline to let you go into it, either the arrest or the conviction." (R. 366) As a result, Mr. Griffin's jury never was allowed to hear that Mr. Miles and Mr. Embry were arrested for the offense, and that Mr. Embry admitted, in an Alabama Circuit Courtroom, that he had committed the offense. Mr. Griffin, by the very substance of the circuit court's ruling, couldn't call *any* witnesses regarding the state's prior prosecution of Miles and Embry, couldn't cross-examine witnesses on this matter, and couldn't introduce documents to verify the prosecution of these two individuals.

Furthermore, the two critical state witness at Mr. Griffin's Alabama murder trial received deals from the state in exchange for their testimony against Mr. Griffin. Mr. Spragg and Mr. Razor, as part of their federal plea agreements, received a promise from the Jefferson County district attorney's office that Alabama would not seek state convictions pursuant to the offenses discussed in their plea allocutions. (C. 213, 220) At the time of Mr. Griffin's trial, neither Mr. Spragg nor Mr. Razor had been sentenced pursuant to their federal pleas. Part of the deal made by the state and federal governments with Spragg and Razor — besides the no-prosecution agreements offered by Alabama — required that they offer helpful testimony at the trials of Mr. Griffin and Mr. Bimbo. A federal agent sat through Mr. Griffin's entire trial to observe the testimony of Spragg and Razor, for

the purpose of reporting their courtroom performance to the federal judge sitting in New York. (R. 529-531) Both Spragg and Razor offered evidence that was absolutely essential to the state's case against Mr. Griffin, including testimony that Mr. Griffin flew to Alabama and shot Mr. Davis, and that he was involved in drug trafficking in New York. (R. 470, 459)

Furthermore, the state lost, destroyed, or otherwise misplaced the case file of the original investigation of Mr. Davis' death. (R. 77, 725-726) This file contained sufficient evidence to lead the state to charge two other individuals with Mr. Davis' death, and lead to the admission of guilt by Embry. (R. 472) Due to the State's loss, destruction, or failure to produce this file, Mr. Griffin was denied access to a considerable body of evidence that the state had previously amassed which had indicated that Embry and Miles committed the Davis murder. The State's evidence connecting Mr. Griffin to the offense was thus confined to the testimony of Razor and Spragg and Mr. Griffin's federal plea allocution. There was no forensic evidence that connected Griffin to Davis's death.

ARGUMENT

The State, in its Question Presented, presents a question that is not presented in this particular case. Specifically, the State argues that it was error of the Alabama Supreme Court to conclude that Chambers v. Mississippi requires that "a state trial court to admit into evidence the nullified plea bargain of a third party to the charged crime, where the third party was available to testify, but was not called to testify by the defendant." This Question Presented by the State does not reflect the circumstances of this case. In this case, as summarized by the Alabama Supreme Court, Mr. Griffin sought to introduce considerable evidence regarding the investigation, identification, and prosecution of Miles and Embry, and evidence of Embry's plea. This evidence included the following evidence: (1) that after the initial police investigation into Davis's death, the state charged Miles and Embry

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with the offense; (2) that Embry admitted to the murder while under oath in an Alabama court, by pleading guilty; (3) that Embry was convicted of the offense pursuant to a pleas agreement, and served four years in Alabama prisons for Davis's death before the State decided to prosecute Griffin; and (4) that a state court ex mero motu dismissed the valid plea of Embry. Ex parte Griffin, No. 1991354, slip op. at 3-4 (Aug. 18, 2000). The trial court, however, denied Mr. Griffin's motions, and did so in a most unequivocal manner: the Court ruled that Mr. Griffin *couldn't go into the plea of Embry or the prosecution of Miles and Embry AT ALL.* Namely, the trial court ruled that Mr. Griffin couldn't present *any evidence — including calling witnesses* — of Mr. Embry's plea and the State's prosecution of Miles and Embry. Thus, the State's "Question Presented" does not accurately reflect the proceedings in this case.

Mr. Griffin was not allowed to present *any* evidence regarding the State's prosecution of two other individuals, and this ruling prevented Mr. Griffin from calling witnesses or examining witnesses on this aspect of the State's lengthy and ever-shifting prosecution of Mr. Davis's murder. The Supreme Court recognized this ruling as error, primarily under the requirements of State law, but also under the requirements of the United States Constitution. For this reason, and for the reasons detailed below, this Court should deny the State's of Alabama's Petition for Writ of Certiorari.

A. This Court Should Deny Certiorari Because the Claim is not Worthy of Certiorari Review

The State's claim is not worthy of certiorari review. This Court's time constraints mandate that it grant certiorari and review on ly those cases with wide-ranging or significant impact. This is not such a case; grant of certiorari and review of this case would have little or no precedential impact. The State is asking, in essence, that this Court grant certiorari to review the Alabama Supreme

Court's interpretation and application of the Alabama rules of evidence regarding the admissibility of evidence in a case marked by egregious state incompetence and misconduct. Such a case does not present a federal issue for this Court, and would plainly have effectively zero precedential value. Additionally, review of this case would require an intensive review of state law and the peculiar facts of this case. See Fay v. Noia, 372 U.S. 391, 436 (1963) ("A petition for writ of certiorari will be granted only for compelling reasons."); Rule 10, *Rules of the Supreme Court of the United States.* The Claim raised by the State in this case only invites this Court to revisit well-established law. Additionally, as noted above, the claim — as presented by the State in its question presented — does not accurately reflect the proceedings at the trial court.

B. This Court Should Deny Certiorari Because the Claim of the State is Without Merit

As detailed above, the Question Presented by the State is not supported by the record. Mr. Griffin sought to introduce a wealth of evidence to show the jury that the State had prosecuted others for the offense, and the trial court prevented Mr. Griffin from doing so, in any shape, form, or manner. Thus, the State's assertion to this Court that Mr. Griffin *could have* called witnesses is simply not borne out in the record: the Court ruled, in unambiguous terms, that he "may not do that [go into Embry's plea], subject to — you can make a note and you appeal on that basis if there's a conviction. I'm familiar with this law that Mr. Cochran cited, as you are too." (R. 306) When Mr. Griffin later attempted to revisit the issue, the trial court reiterated its decision, telling Mr. Griffin that he couldn't go into Embry's plea and conviction: "I don't want our jury, sir, to be confused by the issues, the appropriateness of someone having pled guilty, later vacated by the State. I just think it creates a lot of red herrings for this jury. And I respectfully decline to let you go into it, either the

arrest or the conviction." (R. 366) The ruling of the trial court was unequivocal: Mr. Griffin could not "go into it" regardless of the circumstances. It was a blanket ruling and prevented Mr. Griffin from presenting critical evidence in his defense — including the calling of witnesses. Thus, the State's argument, and indeed, their very question presented to this Court, is not supported by the record — Mr. Griffin couldn't call witnesses, and couldn't present any evidence of the prosecution of Miles and Embry and the plea of Embry, because the trial court ruled that "he couldn't go into it." Calling a witness, as the Alabama Supreme Court appreciated, would constitute "going into it" and was thus prohibited by the trial court's erroneous ruling. The state's argument simply doesn't withstand scrutiny, for it is unsupported by the record in this case.

The State, in its petition, wildly speculates about Mr. Griffin's "strategy" for not calling Embry, asserting that calling Embry would have been damaging to Mr. Griffin's defense. State's Petition, p. 10-12. Mr. Griffin didn't call Embry — or any other witness to testify in this matter — for the simple reason that the trial court ruled that Griffin couldn't go into the State's prosecution of Miles and Embry. For the State to speculate as to why Mr. Griffin didn't call Embry as a witness in the light of this ruling is as absurd as it is irrelevant — Mr. Griffin didn't call Embry because the Court wouldn't allow it.

Furthermore, in a breathtaking display of hubris, the State argues that it was *Mr. Griffin's* actions that resulted in *Mr. Embry's* plea and incarceration for the Davis murder. State's Petition, p.11 ("Griffin's actions allowed an innocent person to plead guilty"). Thus, according to the State, Mr. Griffin would have been reluctant to call Mr. Embry to the stand, for the jury would have blamed *Mr. Griffin* for Mr. Embry's imprisonment. Respectfully, as was recognized by the Supreme Court, it was not Mr. Griffin but the *State* that obtained Mr. Embry's guilty plea for the Davis murder —

the State was the sole party responsible for Mr. Embry's plea, a fact that Mr. Griffin desperately wanted to present to the jury, for it revealed the State to be inept, incompetent, and fickle in their prosecution of this homicide. For the State to argue that its consistently sloppy and unprofessional handling of this murder investigation is the fault of anyone but the State itself blinks reality.

Finally, the State in its brief makes what is essentially a jury argument as to why Mr. Griffin wouldn't have wanted to call Mr. Embry to the stand. Besides the irrelevance of this argument in this context — where the trial court ruled that Mr. Griffin couldn't go into the prosecution of Miles and Embry and Embry's plea at all — this argument is pure speculation. The record plainly reflects that Mr. Griffin sought to present evidence to the jury about the State's prosecution of Miles and Embry; if the State believed — as it currently asserts — that this would have been an unsound defense strategy, it is odd that the State so vigorously opposed Mr. Griffin's efforts at trial, and on appeal to the Alabama Courts. At the very least, as is facially obvious, the State could have, and should have, presented these arguments to the *jury*, and not to the United States Supreme Court. It is not Mr. Griffin that is trying to "have his cake and eat it too", to quote the State's use of this cliché, but the State itself: they vigorously opposed the presentation of evidence critical to Mr. Griffin's defense at trial, and then argue on appeal here that the evidence wouldn't have really helped Mr. Griffin all that much anyhow. State's Petition, p. 12. This Court should not be mislead by this disingenuous argument of the State.

C. This Court Should Deny Certiorari Because the Ruling of the Alabama Supreme Court was Predicated on State Law

Critically, the Supreme Court opinion reversing Mr. Griffin's conviction and sentence of death was largely predicated on *State* law, and not Chambers v. Mississippi as is argued by the State in its

Certiorari petition to this Court. Chambers v. Mississippi, 410 U.S. 284 (1973). Indeed, the majority of the Alabama Supreme Court's opinion is premised on an analysis and interpretation of State law. After discussing Chambers v. Mississippi and Washington v. Texas, 388 U.S. 14 (1967), and two federal cases for *one* paragraph in its opinion, the Alabama Supreme Court then discusses, analyzes, and applies *State* law to the facts of this offense:

> Like the federal courts, Alabama Courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. See Ex parte Walker, 623 So.2d 281 (Ala. 1992); Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988); Green v. State, 258 Ala. 471, 64 So. 2d 84 (1953); Underwood v. State, 239 Ala. 29, 193 So. 155 (1939); Orr v. State, 225 (Ala. 642, 144 So. 867 (1932); Houston v. State, 208 Ala. 660, 95 So. 145 (1923); Tennison v. State, 183 Ala. 1, 62 So. 2d 780(1913); McGehee v. State, 171 Ala. 19, 55 So. 159 (1911); McDonald v. State, 165 Ala. 85, 51 So. 629 (1910). In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:
>
> > 'It general is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted. . . . The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one.
>
> Charles W. Gamble, McElroy's Alabama Evidence, §48.01(1) (5th ed. 1996). to removed this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. three elements must exist before this evidence can be ruled admissible: (1) the evidence 'must be related to the 'res gestae' of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence 'would have to be admissible if the third party was on trial.'' See Ex parte Walker, 623 So. 2d at 284, and Thomas, 539 So. 2d at 394-396.
>
> We find these elements present in Griffin's case. The evidence Griffin offered certainly relates to the res gestae of the offense. Likewise, if believed by a jury, that evidence would also exclude Griffin as Davis's killer. Finally, the evidence would be admissible if Embry and Miles were on trial. Therefore, any documents that pertain to this probative theory should be admissible.

Ex parte Griffin, No. 1991354, slip op. 5-7 (Ala. Aug. 18, 2000). Contrary to the State's argument,

the opinion of the Alabama Supreme Court did not turn on an erroneous interpretation and application of Chambers, but relied primarily on a properly reasoned interpretation of state law.[1]

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[1] Indeed, much of Mr. Griffin's argument to the Alabama Supreme Court turned on the application of *State* law. Mr. Griffin presented a lengthy briefing of the *State* law that required the Court to grant a new trial in this case. At the risk of being irrelevant, but to make the point that this is primarily an issue of interpretation and application of State law, Mr. Griffin's arguments regarding the State law guiding this issue are partially reproduced in this admittedly lengthy footnote, including the following:

The law of Alabama that requires a defendant be permitted to introduce this type of evidence dates to the middle of the 19th Century. "'One accused of crime may show his own innocence by proof of the guilt of another; but the evidence of the guilt of other must related to the res gestæ of the event — the perpetration of some deed entering into the crime itself.'" Spicer v. The State, 198 Ala. 13 (Ala. 1916) (quoting McDonald's Case, 165 Ala. 89 (1910) and citing Levison v. The State, 54 Ala. 520 (Ala. 1875)); see also Snow, *et al.* v. The State, 58 Ala. 372, 375 (Ala. 1877) ("It was certainly proper for the defendants to show, that if the offense had been committed, [a third party] was the guilty agent in its commission, and that they were free from all guilty connection with it." The Snow court then found that such evidence when introduced by co-indictees and where there is a possibility that each could confess to the offense and thereby both could escape punishment, is not admissible); Smith v. State, 9 Ala. 990 (Ala. 1846) (finding that mere hearsay, unsworn and unreliable, should not be admitted to show the culpability of a third party, but indicating that more reliable evidence *should* be admitted).

Somewhat more recent law follows the precedent of the older Alabama cases:

> 'While it is always proper and relevant for accused to show that someone else committed the crime without his aid or participation . . . . competent evidence which tends to prove that another committed the crime for which the accused is being tried is admissible if it is inconsistent with the guilt of the accused.

Blevins v. State, 283 So. 2d 664, 670 (Ala. Crim. App. 1973) (quoting 22A C.J.S. Criminal Law §622) (emphasis supplied). The rule that evidence that another committed the crime for which the accused stands trial has been repeatedly affirmed by the Alabama appellate courts. Ex parte Walker, 623 So. 2d 281, 284 (Ala. 1992) ("an accused may offer evidence that some other person committed the crime"); Flowers v. State, 586 So. 2d 978, 985-986 (Ala. Crim. App. 1991) ("[a]s a general rule, an accused may introduce any legal evidence that tends to show that someone else committed the crime for which he is charged") (quoting Green v. State, 64 So. 2d 84 (Ala. 1953)); Travis v. State, __ So. 2d __, CR-92-958, *21 (Ala. Crim. App. April 18, 1997) ("'an accused may introduce any legal evidence that tends to show that someone else committed the crime for which he is charged'") (quoting Green v. State, 64 So. 2d 84 (Ala. Crim. App. 1953); Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988) (same); Coral v. State, 628 So. 2d 954, 983 (Ala. Crim. App. 1992) ("it is generally held that a defendant . . . may prove that another person committed the crime for which the defendant is being tried"); Alldredge v. State, 431 So. 2d 1358, 1361 (Ala. Crim. App. 1983) ("The appellate courts of this state have recognized that one accused of a crime may show his innocence by proof of the guilt of another"). See also MCELROY'S ALABAMA EVIDENCE, §48.01(1) ("It is agreed that an accused, in disproving his own guilt, may prove that another person committed the crime for which the accused is being tried. This right of the criminally accused is often termed incrimination of another or simply alibi evidence.")

To be sure, the rule that evidence of another's responsibility for the offense is admissible is subject to several well-established caveats. The Alabama Supreme Court has concisely summarized the requirements for admission of evidence that someone else committed the offense: (1) the evidence must be competent as if the third party were on trial; (2) the evidence must be related to the res gestæ of the offense; and (3) it must exclude the accused as a perpetrator of the offense. Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988); see also Ex parte Walker, 623 So. 2d 281 (Ala. 1992); Coral v. State, 628 So. 2d 954 (Ala. Crim. App. 1992). All three requirements were met in this instance, yet Griffin's trial court nonetheless blocked the evidence.

The foremost requirement for admission of evidence that a third party committed the offense is that the evidence be competent. Thus, mere hearsay that another was the responsible party is not admissible. Flowers v.

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State, 586 So. 2d 978 (Ala. Crim. App. 1991) (jail house conversation in which a third party stated that he was responsible for the offense ruled inadmissible hearsay); Houston v. State, 95 So. 145, 146 (Ala. 1923) (citing Welsh v. State, 96 Ala. 92 (1891)) (evidence of another's guilt "must be done by legal evidence, and not by the testimony of witnesses who heard another admit that he committed the offense"); West v. The State, 76 Ala. 98 (Ala. 1884); Snow, *et al.* v. The State, 58 Ala. 372 (Ala. 1877); Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988). Each of these cases deals with a category of evidence radically different from that which confronted the trial judge in this case. In Flowers, for example, the Court of Criminal Appeals reaffirmed that mere out-of-court statements of a third party admitting guilt, made to another inmate in prison, are not admissible since such statements are mere hearsay. Flowers v. State, 586 So. 2d 978 (Ala. Crim. App. 1991). Revealingly, the state improperly relied upon Flowers in its motion in limine to exclude the evidence. (R. 305) Likewise, in Thomas, the Alabama Court of Criminal Appeals found that mere hearsay statements of a third party, overheard by another whom the state called as a witness, was properly excluded as unreliable. Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988).

Such a rule excluding unreliable hearsay evidence suggesting the involvement of a third party is well-taken: the confusing effects on the jury, the possibility of a virtually unlimited number of witnesses to claim that someone else had admitted to the offense, and the potentially subverting effects on the truth seeking-function of criminal proceedings all militate to exclude hearsay evidence that another admitted to the offense for which a criminal defendant stands trial since such statements lack *any* indicia of reliability. In this case, the evidence Mr. Griffin sought to introduce was *not* hearsay, but is an in-court admission of guilt, an acceptance of responsibility for the offense, and an acceptance of a twenty-year sentence for the crime. Further, the plea was surely entered into in face of the state's evidence indicating Mr. Embry's guilt, and his responsibility for the crime was accordingly corroborated by the state's evidence. Further, the state *accepted* the plea as a correct acceptance of responsibility for the murder, and sentenced Mr. Embry to twenty years imprisonment. Accordingly, the Flowers rule that rank hearsay evidence lacking *any* independent indicia of reliability is inadmissible is simply not applicable to this case.

The second requirement for admission of evidence of another's responsibility for the offense is that it must go to the res gestæ of the offense. Accordingly, res gestæ evidence does not include evidence that merely tends to show the bad character or motive of a third party. Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988) (evidence which would have not exonerated the appellant, and would have merely tended to show that another person was present at the time of the offense does not go to the res gestæ). Critically, evidence that *does* go to the res gestæ of the offense *is* admissible. Lowery v. State, 155 So. 313, 315 (Ala. App. 1934) ("[t]he defendant has a right to show his innocence by proof of the guilt of another, provided the evidence relates to the res gestæ of the event"). Further, a defendant may not introduce evidence that some other party was merely a suspect in the offense, or that she or he fled the scene of the offense. Lindsey v. State, 93 So. 331, 332 (Ala. App. 1922) (evidence "that a third person, who was suspected of the crime, fled from the county soon after it was committed is inadmissible"); Ward v. State, 72 So. 754 (1916) (same); Kemp v. State, 7 So. 413 (1890); Brown's Case 25 So. 182 (1899); but see Smith v. State, 9 Ala. 990, 996 (Ala. 1846) ("[i]f such acts could ever be admissible in evidence, in favor of third persons, it must be on the ground, that being spontaneous result of the operation so of the mind, they indicate with reasonable certainty, the existence of those facts, of which they are the manifestation"). In Griffin's case, the evidence was clearly res gestæ evidence: Mr. Embry pled guilty to the offense, and thus *admitted* to the very question of who killed Mr. Davis. It was an admission to the very matter for which Mr. Griffin stood trial five years later. More precisely on-point *res gestæ* evidence could scarcely be conceived.

The third requirement for the admission of evidence that another committed the offense is that the evidence must tend to exculpate the accused. Merely showing that someone else was *also* present does not suffice, and such evidence is properly excluded from criminal trials as tending to confuse the jury and distract them from assessing the accused's guilt. In Thomas, for example, this Court found that hearsay evidence which suggested that another was present at the time of the offense was not admissible, both because it was hearsay *and* because it did not exculpate the accused. Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988). Likewise, in Yancey v.

This Court should not grant certiorari to review the Alabama Supreme Court's interpretation and application of Alabama State law.

D. This Court Should Deny Certiorari Because the Question Presented will not Resolve and Ambiguity in Federal Law, and Will not Resolve and Circuit Split

The State attempts to argue that the opinion of the Alabama Supreme Court conflicts with decisions in the Federal Circuit Courts. State's Petition, p. 12-14. With all due respect, this

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State, this Court ruled that evidence which merely showed another person was present with the defendant in the commission of the offense, and that the third person was convicted, does not exculpate the accused, and is accordingly not admissible as showing that the defendant did not commit the offense. Yancey v. State, 446 So. 2d 686 (Ala. Crim. App. 1983). Similarly, in Blevins, this Court found that evidence of another's involvement in an offense must be inconsistent with the guilt of the accused. Blevins v. State, 283 So. 2d 664 (Ala. Crim. App. 1973). This third requirement is again clearly met in this case: the evidence did not merely tend to put Miles and Embry at the scene of the crime, it tended to establish that *they* were the two individuals seen to kill Mr. Davis, and not Mr. Griffin. There was certainly no evidence educed that even suggested that Miles, Embry, and Griffin were operating in cahoots when Davis was killed. Accordingly, this requirement does not operate to bar the admission of this evidence.

The trial court erred when it prevented Mr. Griffin from presenting this evidence, which would have lent great weight to his alibi defense. The trial court relied heavily upon McElroy's ALABAMA EVIDENCE when it entered its ruling against Mr. Griffin. This was error, for several reasons. First, as noted above, following McElroy's in this instance violated clear Supreme Court precedent. Chambers v. Mississippi, 410 U.S. 284 (1973). The trial court was obligated to ensure that Mr. Griffin was accorded his due process rights, as clearly articulated by the United States Supreme Court.

Second, the trial court misapplied McElroy's, for McElroy's does not address this issue, and, indeed, states that Alabama law *generally requires that a defendant be permitted to present evidence indicating that another is the guilty party.* MCELROY'S ALABAMA EVIDENCE, 48.01(1) ("It generally is agreed that an accused, in disproving his own guilt, may prove that another person committed the crime for which the accused is being tried.") A subsection of McElroy's overstates Alabama law, and this subsection may have mislead the trial court to its erroneous ruling, despite the "general agreement" that evidence of another's guilt should be admitted. Section 48.01(5) of McElroy's states in its entirely that "[t]he accused may not prove that another person has been convicted of the crime for which the accused is being tried" and cites two seventy-year-old cases in support of this proposition: Glass v. State, 98 So. 702 (Ala. 1923) and Pool v. State, 98 So. 309 (Ala. 1923).

Neither case is on point. In Glass, the Court of Appeals of Alabama found that the trial court properly blocked the defense from presenting evidence that accomplices had already been convicted of the offense. Glass v. State, 98 So. 702 (Ala. App. 1923) Such evidence is clearly excludable: it was not inconsistent with the guilt of the accused. Similarly, in Pool, the Court of Appeals of Alabama held that a defendant was not permitted to show that a co-defendant was also convicted of the crime illegal possession of a still, where an eyewitness saw the defendant an his co-defendant in "an oxcart in which a still was being transported." Pool v. State, 98 So. 309, 309 (Ala. App. 1923). Again, the evidence in Pool was not inconsistent with the guilt of the accused. In Mr. Griffin's case, the evidence that Mr. Griffin sought to introduce was quite clearly inconsistent with Griffin's guilt, and accordingly this section of McElroy's is not on point. Neither McElroy's, nor any other hornbook, nor Alabama law support the notion that such evidence could properly be excluded from a capital murder trial. More important, however, is the incontrovertible that an accused must be permitted to present a defense of his choosing.

argument fails, for the very premise of the State's argument is unsupported by the record: the State presumes that Mr. Griffin could have called Mr. Embry, whereas the trial court plainly and unequivocally ruled that Mr. Griffin could not "go into" the prosecution of Miles and Embry or the plea of Embry *at all*. Accordingly, the State's argument that some Federal Circuit Courts have interpreted and applied Chambers after considering the availability of a witness to testify is irrelevant here. More critical to the analysis of the application of Chambers in this case is the question of whether the Alabama Supreme Court properly recognized and applied the Chambers, and not how other circuit courts have applied Chambers in completely different circumstances.[2] Examination of the opinion below plainly reveals that Chambers was properly applied in this instance. First, the Alabama Supreme Court noted that Chambers must be applied with the recognition that the "trial court will have to consider the admissibility of such evidence [of a third party's guilt] in conjunction with other legitimate interests involved in the trial process." Ex parte Griffin, No. 1991354, slip op. 5 (Ala. Aug. 18, 2000). The Alabama Court continued, noting that

> As a result, the trial court is presented with a balancing test in order to determine whether the evidence of a third party's culpability is properly admissible:
>
> > 'The court must weight the defendant's 'strong interest in presenting exculpatory evidence' against the state's interest 'in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party.

Ex parte Griffin, No. 1991354, slip op. 5-7 (Ala. Aug. 18, 2000) (quoting United States v. Johnson, 904 F. Supp. 1303 (M.D. Ala. 1995) (citations omitted). After discussing and applying state law in this case, the Alabama Supreme Court briefly cites Chambers again, and then concludes that in

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[2] Ignoring, for a moment, the fact that the Alabama Supreme Court's opinion was largely premised on State law.

reversing this case, "we note that not in every case will the defendant's right to present his defense supersede the hearsay rule; it will supersede that rule only in those cases that, as indicated by the first two elements of the test [under state law] stated above, have a probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury." Ex parte Griffin, No. 1991354, slip op. 8-9 (Ala. Aug. 18, 2000). Plainly, the Alabama Supreme Court did not apply Chambers in a rash or unthoughtful manner in this case; indeed, this reversal is the *only* reversal wherein the Alabama Supreme Court has cited to Chambers as partially guiding their legal analysis. In addition, the Alabama Supreme Court is plainly well-aware of the limited applicability of Chambers, and indeed cites previous state law that limits the application of Chambers to those cases wherein unusual circumstances and erroneous application of state evidentiary laws combined to create a Due Process violation. Ex parte Griffin, No. 1991354, slip op. 5-6 (Ala. Aug. 18, 2000) (citing Thomas v. State, 539 So.2d 375 (Ala. Crim. App. 1988). As this Court noted in Chambers, and as the Alabama Supreme Court noted in Griffin, extraordinary circumstances can occasionally — albeit quite infrequently — require that the mechanical application of rules of hearsay make way for the requirements of Due Process. As in Chambers, the proceedings at Mr. Griffin's trial are such a case.

E. The Opinion of the Alabama Supreme Court was Mandated by the Requirements of Due Process, Alabama State Law, *Caldwell v. Mississippi*, and the Circumstances of this Case

The State, in its petition to this Court, ignores several critical aspects of this case that doubtlessly caused the Alabama Supreme Court to reverse. While the Alabama Supreme Court did cite to Chambers and partially rely on this Court's reasoning in that opinion, this case was in many respects *more* egregious than what occurred in Chambers: the evidence that Griffin's trial court

refused to admit was *not* hearsay, but was competent and admissible evidence — it was an *in-court sworn admission of guilt*.[3] The record of the plea agreement, and the conviction, was clearly admissible under Alabama law, and its exclusion at Mr. Griffin's trial was clear and reversible error. Indeed, since it was evidence derived from in-court proceedings, it was by very definition *not hearsay*.

The Court of Criminal Appeals relied upon Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988) to distinguish Chambers v. Mississippi. This reliance was misplaced. While Mr. Griffin readily admits that Chambers is distinguishable from the case at bar, the distinguishing fact is that the exclusion of the evidence in this instance was even *more* egregious than that which occurred in Chambers: the evidence which Griffin's trial court refused to admit was *not* hearsay, but was competent and admissible evidence. Thus, even without the constitutional guarantee elucidated in Chambers, the trial court should have admitted the evidence. The lower court's opinion in Thomas is simply not on point: Thomas distinguished Chambers because there were no indications of reliability of the excluded evidence in Thomas's case, unlike the excluded evidence in Chambers and unlike the evidence Mr. Griffin sought to introduce at his trial. Thomas v. State, 539 So. 2d at 396. This distinction does not apply here: in this instance, there are extraordinary indicia of the reliability of the excluded evidence.

Indeed, it was evidence of the most reliable type: it was an *in-court sworn admission of guilt*: the statement was made in court, before a judge, prosecutor, defense counsel, and a court reporter. The trial engaged in a colloquy with Mr. Embry to ensure that Mr. Embry knew what he was pleading

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[3] In addition, it was clearly against Mr. Embry's interests to make such an admission: he was sentenced to twenty years after entering the plea! This renders the evidence — assuming that an in-court oath does not suffice — sufficiently reliable to be admissible.

to and the consequences therefrom. Further, the trial court had to reach a determination that there was an adequate basis for Mr. Embry's plea, and that the plea was reliable and trustworthy. Such evidence not only bears some indicia of reliability, it bears the highest indicia of reliability. Concerns regarding the reliability of the evidence forms the basis of excluding evidence under the rules of hearsay; as the United States Supreme Court held in Chambers, exclusion of reliable evidence through the mechanistic application of the rules of evidence violates the Due Process Clause of the Fourteenth Amendment. Ignoring the wealth of state law that required that this type of evidence be admitted, the Alabama Supreme Court relied on Chambers for the simple proposition that occasionally the mechanistic application of state evidentiary rules must yield to the requirements of Due Process.

In Chambers v. Mississippi, this Court addressed injustice fostered by a gravely malfunctioning criminal justice system that existed in the late 1960's in the Deep South; now, over thirty years later, the system has again malfunctioned. The Alabama Supreme Court recognized the egregious flaws of this capital conviction and death sentence, and was compelled to reverse Mr. Griffin's conviction and sentence of death. Accordingly, this Court should deny the State's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner preys that this Court DENY the State's petition for a Writ of Certiorari.

Respectfully Submitted,

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February 26, 2001